ORIGINAL

83-6150

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JESSE JOSEPH TAFERO,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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(305) 371-1597

Attorneys for Petitioner

January 24, 1984

QUESTION PRESENTED

Whether Florida's procedural rule on post-conviction relief, which precludes a death penalty defendant from obtaining an evidentiary hearing on the truth of the state's key witness' recantation, denies due process?

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NO.

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JESSE JOSEPH TAFERO,

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versus

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

The Petitioner Jesse Joseph Tafero respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the Supreme Court of Florida entered on November 29, 1983. Tafero v. State, 440 So.2d 350 (Fla. 1983).

OPINIONS BELOW

The Supreme Court of Florida denied Tafero leave to file a petition for writ of error coram nobis on October 6, 1983. Two justices dissented. The court denied rehearing. Copies of the order denying leave, the dissents and the order denying rehearing are contained in the appendix. (A. 1-4).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

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be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Eighth Amendment, United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Tafero was convicted on two counts of first degree murder and sentenced to death on May 18, 1976.[1/] The Supreme Court of Florida affirmed his conviction and sentence. Tafero v. State, 403 So.2d 355 (Fla. 1981).[2/]

Facts Concerning Relief Sought

Tafero filed a motion for leave to file petition for writ of error coram nobis in the Supreme Court of Florida. He requested only that the Court grant him leave to obtain an evidentiary hearing in the trial court. The primary purpose of that hearing was to determine the truth of the sworn recantation of the State's key witness against him.

The motion for leave contained two aspects. First, Tafero relied on the newly discovered sworn testimony of Walter Norman

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1/ No death warrant has been signed yet.

2/ The trial court found certain aggravating factors: (1) the murders were committed while defendant was on parole and a fugitive; (2) defendant had a significant history of criminal activity involving violence, all arising out of a single incident; (3) the murders were committed to avoid arrest; (4) the murders were committed to hinder law enforcement; (5) the murders were heinous, atrocious and cruel; and (6) Tafero created a great risk of death to many persons. The Supreme Court found that the last two factors were not supported by the evidence. However the court found that a new sentencing proceeding was not necessary because the trial court had found no mitigating factors.

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Rhodes, Tafero's co-defendant and the only witness who testified at trial that Tafero shot anyone. Rhodes testified for the State in return for the State's agreement not to seek the death penalty in his case. But in September 1982, Rhodes spontaneously sent an affidavit to the state attorney for Broward County, which specifically recanted his trial testimony. Rhodes subsequently reaffirmed the contents of that affidavit in a lengthy and detailed sworn statement. He unequivocally accepted responsibility for the shootings for which Tafero stands sentenced to death. Rhodes, not Tafero, was the triggerman.

Second, Tafero's motion relied on sworn evidence that he did not commit certain offenses for which he was convicted in 1967. Those 1967 convictions were the primary aggravating factor which led to imposition of the death penalty.

The Supreme Court of Florida denied Tafero leave to file a petition for writ of error coram nobis on either ground. He could not even obtain an evidentiary hearing on the truth of the matters raised. Two justices dissented. Justice Boyd stated:

> I dissent and would grant leave to apply for a writ of error coram nobis. I believe that when a witness, under penalty of perjury, recants critical testimony given at the trial, there should be an evidentiary hearing. Such a recantation raises the question of whether an innocent person has been sentenced to prison or the electric chair on the basis of perjured testimony. Surely when a substantial question of such a miscarriage of justice has been raised, the state, society, and the courts should be sufficiently concerned to require further inquiry.

(A. 2). Justice Overton's dissent was also simple and direct.

> I would find that whenever the asserted recanted testimony was a critical feature of the trial there must be an evidentiary hearing.

(A. 3).

Underlying Facts

This incident began at a rest stop in Broward County where Tafero, Sonia Linder, their children and Walter Rhodes had pulled over to sleep. Early in the morning they were awakened by a state trooper looking into the car. He apparently noticed a gun between the seats, opened the front door and took the gun. The

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trooper then began questioning Rhodes, Tafero and Linder. The events which followed culminated in the shooting of the state trooper and a visiting Canadian officer.

Three primary witnesses testified at Tafero's trial concerning the shooting. Two of those witnesses were disinterested and independent. They were truck drivers who pulled into the rest area and parked about 150 feet behind the trooper's car. They watched almost the entire sequence of events. Each of them testified that the Canadian officer was holding Tafero up against the trooper's car with his arm pinned behind his back at the time the shots were fired. Tafero did not fire the shots which killed the officers.

The third witness was Rhodes. He testified that Linder fired some shots from the rear seat of the car. Tafero then ran over to her, took the gun and fired the remaining shots.

It is this trial testimony which Rhodes recanted in his affidavit and sworn statement. In the summer of 1982, Rhodes contacted the news media and gave a three-hour taped interview in which he described every aspect of the incident. He sent an affidavit to the Broward County state attorney in which he repudiated his trial testimony and admitted that he, not Tafero and Linder, had killed the officers. Rhodes then gave a full statement under oath to Tafero's counsel. He reiterated that he had shot the officers, Tafero did not shoot anyone and Tafero had no idea that Rhodes was going to shoot anyone.

Despite Rhodes' repeated recantation under oath, the Supreme Court of Florida refused to allow Tafero leave to file a petition for writ of error coram nobis and obtain an evidentiary hearing on the truth or falsity of Rhodes' statements. It applied the standard which requires that the new evidence "conclusively" would have prevented the conviction.

REASONS FOR GRANTING THE WRIT

Florida requires a defendant to demonstrate that newly discovered evidence conclusively would have prevented the entry of judgment before the defendant may obtain an evidentiary hearing

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on the truth of the evidence. This rule violates the sixth, eighth and fourteenth amendments to the United States constitution. The evidence as to which Tafero was denied a hearing would have demonstrated that he did not pull the trigger.[3/] And that evidence would also have demonstrated that Tafero did not commit the crimes for which he was convicted in 1967, the basis for the finding of a "significant history of prior criminal activity". If Tafero had no committed the 1967 crimes, then the evidence would have shown the mitigating factor of no significant history of prior criminal activity.

Florida requires that the appellate court which affirms a conviction grant permission for a defendant to present newly discovered evidence to the trial court. Hallman v. State, 371 So.2d 482 (Fla. 1979). The evidence must meet two basic requirements: (1) it must be newly discovered; and (2) it "conclusively would have prevented the entry of the judgment." 371 So.2d at 485. Application of the second requirement in death penalty cases leads to unreasonable and improperly harsh results. As pointed out by the dissenting justices in Hallman:

> A death case should be an exception to the "conclusiveness test." In my view, the rigid application of the "conclusiveness test" is not proper in cases where the death penalty has been imposed. As Mr. Justice Stephens said in writing for the plurality in Gardner v. Florida, 430 U.S. 349, 351, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the death penalty is different from any other means of punishment, both in its severity and finality. I also believe our failure to consider these allegations on the merits at the sentencing phase will result in a weakening of our death penalty statute and could lead to a reversal of this clause under the principles expounded by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The majority in Lockett stated

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3/ The jury here returned a general verdict which could have been based on premeditated murder or felony murder. This Court has held that a general verdict must be set aside where it rests on both constitutional and unconstitutional grounds. Stromberg v. California, 283 U.S. 359 (1931). Therefore where, as here, the death penalty could have been based on findings of either premeditated murder or felony murder, and it would be unconstitutional to base the death penalty on felony murder, Enmund v. Florida, 455 U.S. 1015 (1982), a new trial is required. Cf. Zant v. Stephens, 456 U.S. 410 (1983). This issue was not an appropriate ground for coram nobis relief.

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> that: "The need for treating each defendant in a capital case with that degree of respect due to uniqueness of the individual is far more important than a non-capital case is." 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990.
>
> In conclusion, the majority's mistake in this case is not allowing [the new evidence] to be considered on its merits in regard to the appropriateness of the death penalty in this cause.

371 So.2d at 487 (Overton, J., dissenting). Furthermore, there is no rational reason for applying this conclusiveness standard based solely on the time at which the evidence is discovered. Fla.R.Crim.P. 3.600(a)(3) permits a motion for new trial based on newly discovered evidence if that evidence "would probably have changed the verdict or finding of the court." But that motion must be filed within 10 days of the verdict. Fla.R.Crim.P. 3.590. See also Fed.R.Crim.P. 33. Where, as here, a defendant cannot control the time at which supportive evidence will appear, he becomes subject to the law's vagaries which impose the burden on him of conclusively demonstrating something which he otherwise would not have to demonstrate.[4/]

Further, the Florida courts appear to interpret the conclusiveness test arbitrarily. Just before the Florida Supreme Court denied Tafero's motion for leave to file a coram nobis petition, the court issued its opinion in another death penalty case. Brown v. State, 439 So.2d 872 (Fla. 1983). In Brown, the Florida Supreme Court previously had remanded for an evidentiary hearing when the key state witness filed an affidavit recanting his trial testimony.[5/] The following appears on the face of the opinion:

> The first time Floyd recanted, Brown's counsel secured a post-trial affidavit from him stating that his trial testimony was false and that it was given in return for a prosecutori-

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4/ Apparently the only time the Supreme Court of Florida has found that a defendant met the conclusiveness test was where the prosecuting attorney admitted that the newly discovered evidence showed the defendant was not guilty and had a complete alibi. Ex parte Welles, 53 So.2d 708 (Fla. 1951).

5/ The fact that the trial court subsequently denied the motion and found that the recantation was not believeable is not relevant to the threshold question of whether an evidentiary hearing should be granted.

> al offer of favorable consideration. This Court granted Brown's motion to remand for an evidentiary hearing.

Id.

Other Florida courts grant evidentiary hearings where newly discovered evidence relates to the truth of the State's evidnece or shows that another confessed to committing the crime for which the defendant was convicted. E.g., Walden v. State, 310 So.2d 426 (Fla. 3d DCA 1975)(defendant granted evidentiary hearing on newly discovered evidence claim that another person confessed to crime for which defendant convicted; court found confession not believeable); Kellerman v. State, 287 So.2d 702 (Fla. 3d DCA 1973)(evidentiary hearing required where newly discovered evidence showed that state witnesses/codefendants had committed an unrelated crime at the same time they testified they participated in crime for which defendant was found guilty); Fast v. State, 221 So.2d 203 (Fla. 3d DCA 1969)(defendant granted evidentiary hearing on newly discovered evidence claim that another person confessed to crime for which defendant convicted; court found confession not believeable).

This Court has recently held that the sentencing authority must consider in mitigation any aspect of defendant's character and any of the circumstances of the offense. The sentencer cannot refuse to consider mitigating evidence as a matter of law. Eddings v. Oklahoma, 455 U.S. 104 (1982). See also Lockett v. Ohio, 438 U.S. 586 (1978):

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett, supra, 438 U.S. at 605.

Similarly, this Court has held that a state procedural rule which precludes the sentencing authority in a death case from considering relevant and reliable evidence violates the sixth,

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eighth and fourteenth amendments. Green v. Georgia, 442 U.S. 95 (1979). In Green, defendant sought to prove during the sentencing trial that he was not present when the victim was killed. He attempted to introduce the testimony of a witness who had testified for the state at the codefendant's trial. The witness would have testified that the codefendant admitted to him that he had shot the victim after sending defendant out on an errand. The court refused to allow this testimony in evidence on the ground that it was hearsay. This Court held that the exclusion of this testimony was error.

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assume its reliability.

442 U.S. at 97.

Despite the holdings in Eddings and Green, which so strongly highlight this Court's concern with full consideration of factors which mitigate against imposition of the death penalty, the coram nobis conclusiveness test prevents consideration of mitigating evidence which is critical and relevant to imposition of the death penalty. It improperly precludes consideration of mitigating evidence. It permits an execution where the State's only witness swears that he, not the defendant, pulled the trigger. It permits an execution where there is sworn testimony that a third person, not the defendant, committed the prior crimes on which the sentencing judge relied as a key aggravating factor.

The proferred evidence from Rhodes would demonstrate that Tafero did not pull the trigger. That alone should preclude entry of the death sentence. Enmund v. Florida, supra. The remaining evidence would show that Tafero did not commit the crimes of which he was convicted in 1967. Therefore the trial court should not have found the aggravating factor of a significant history of prior criminal activity. Rather, Tafero would have no significant history of prior criminal activity in the absence of

the 1967 convictions. This is a mitigating factor.

A defendant should not be precluded from obtaining an evidentiary hearing concerning the recantation of the State's key witness because that defendant might not "conclusively" demonstrate that the judgment would be different. Courts dealing with the death penalty cannot and should not impose such an unmeetable burden and thereby treat the defendant's life so lightly. The application of the conclusiveness test to newly discovered evidence in a death penalty case is improper.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Supreme Court of Florida.

Respectfully submitted,

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Attorneys for Petitioner

By: _____
MARC COOPER

By: _____
SHARON L. WOLFE

January 24, 1983

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Supreme Court of Florida

THURSDAY, OCTOBER 6, 1983

JESSE JOSEPH TAFERO,
Petitioner,
vs. CASE NO. 62,847
STATE OF FLORIDA,
Respondent.

On consideration of the Motion for Leave to File Petition for Writ of Error Coram Nobis, it is ordered by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, McDONALD and EHRLICH, JJ., Concur
BOYD, J., Dissents with an opinion
OVERTON, J., Dissents with an opinion, in which BOYD, J., Concurs

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Elizabeth J. Du Fresne, Esquire
of Du Fresne & Bradley, P.A.
Miami, Florida

Marc Cooper, Esquire
of Greene & Cooper, P.A.
Miami, Florida

Attorneys for Petitioner

Joy B. Shearer, Esquire
Assistant Attorney General
West Palm Beach, Florida

Attorney for Respondent

BOYD, J., dissenting.

I dissent and would grant leave to apply for a writ of error coram nobis. I believe that when a witness, under penalty of perjury, recants critical testimony given at the trial, there should be an evidentiary hearing. Such a recantation raises the question of whether an innocent person has been sentenced to prison or the electric chair on the basis of perjured testimony. Surely when a substantial question of such a miscarriage of justice has been raised, the state, society, and the courts should be sufficiently concerned to require further inquiry.

Overton, J., dissenting.

I dissent. I would find that whenever the asserted recanted testimony was a critical feature of the trial there must be an evidentiary hearing.

BOYD, J., Concurs

IN THE SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 29, 1983

JESSE JOSEPH TAFERO,	**	
Petitioner,	**	
vs.	**	CASE NO. 62,847
STATE OF FLORIDA,	**	
Respondent.	**	

On consideration of the motion for rehearing filed by attorneys for petitioner, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

cc: Elizabeth J. DuFresne, Esquire
Marc Cooper, Esquire
of Greene & Cooper
Bruce M. Lee, Esquire

NO. 83-6150

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

JESSE JOSEPH TAFERO,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Jesse Joseph Tafero requests leave of this Court to proceed in forma pauperis on his petition for writ of certiorari pursuant to Sup.Ct.R. 46 and states:

1. Tafero is on death row. This petition seeks review of the Supreme Court of Florida's denial of Tafero's motion for leave to file a petition for writ of error coram nobis.

2. Tafero had court appointed counsel at his trial. He was represented by the Public Defender, West Palm Beach, Florida on direct appeal to the Supreme Court of Florida. The Supreme Court of Florida permitted him to proceed in forma pauperis on his coram nobis motion.

3. Attached to this motion is an affidavit which sets out the facts in support of this motion.

WHEREFORE Petitioner Jesse Joseph Tafero requests leave of this Court to proceed in forma pauperis.

Respectfully submitted,

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Counsel of Record
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Suite 500, Roberts Building
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Miami, Florida 33130
(305)371-1597

Attorneys for Petitioner

By: _____
MARC COOPER

NO.

IN THE SUPREME COURT OF THE UNITED STATES

JESSE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

_____/

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, JESSE JOSEPH TAFERO, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on petition for writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting these proceedings are true.

1. I am not presently employed. I was last employed on 1974 and received a salary of $ 400 per month.

2. Within the past 12 months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

3. I do not own any cash or checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is presently dependent on me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

JESSE JOSEPH LAFERO

SWORN TO AND SUBSCRIBED before me this 12 day of January, 1984.

Notary Public, State of Florida at Large

My commission expires: NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 23, 1987

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v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Florida

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

QUESTION PRESENTED

WHETHER THE FLORIDA CORAM NOBIS PROCEDURE IS VIOLATIVE OF A DEFENDANT IN A CAPITAL CASE'S CONSTITUTIONAL RIGHT TO DUE PROCESS?

INDEX

CITATIONS

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IN THE
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RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondent accepts the Petitioner's jurisdictional statement, with the addition that the Florida Supreme Court's order denying rehearing was entered on November 29, 1983, so the Petition for Certiorari was timely filed pursuant to Rule 20 of the rules of this Court.

STATEMENT OF THE CASE

A. SUMMARY OF PROCEEDINGS IN THE STATE COURTS

The Petitioner was convicted of two counts of first degree murder, robbery, and kidnapping in Broward County, Florida, and was sentenced to death by the trial judge for the murders in accordance with the jury's recommendation. The judgments and sentences were affirmed

by the Florida Supreme Court on direct appeal. Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 445 U.S. 983 (1982). In affirming the convictions, the Florida Supreme Court specifically found there was sufficient evidence of the Petitioner's guilt and rejected his contention that co-indictee Walter Rhodes did the shooting:

> Tafero challenges the sufficiency of the evidence to convict him of murder, but the evidence against him is overwhelming. In addition to the eyewitness testimony, bullets removed from the victims match the gun in Tafero's possession at his arrest. We do not accept Tafero's contention that Rhodes' testimony was unbelievable in that Rhodes actually did the shooting. Rhodes' testimony is corroborated by both the physical evidence and the other eyewitnesses' testimony. Additionally, both truck drivers noticed Rhodes' hands in the air when the first shots were fired. The evidence shows beyond a reasonable doubt that Tafero is guilty of the premeditated murder of both Irwin and Black.

Tafero v. State, supra, at 359.

The Petitioner was previously convicted in 1967 in Dade County, Florida, for assault with intent to commit rape, entering without breaking an apartment with the intent to commit robbery, and the crime against nature. These convictions were affirmed on direct appeal. Tafero v. State, 223 So.2d 564 (3DCA Fla. 1969), cert. denied, 225 So.2d 912 (Fla. 1969). In affirming, the Court of Appeal found that:

> The record contains ample substantial evidence which supports the verdict and judgment, namely, the unequivocal testimony of both complainants that the Appellant was the man referred to as Jessie.

Tafero v. State, 223 So.2d at 568.

The Petitioner in 1979 filed a motion for new trial in the trial court with regard to the 1967 convictions,

based upon the purported confession of a third party and the alleged hearsay recantation of the State's witnesses. The trial court denied the motion and the Petitioner appealed to the Third District Court of Appeal of Florida. That court held the trial court was without jurisdiction to hear the motion for new trial, but it nonetheless treated the appeal as a request for permission to apply to the trial court for a Writ of Error Coram Nobis. Tafero v. State, 406 So.2d 89, 92 (3DCA Fla. 1981). The court found the new evidence would at best raise a jury question and would not have conclusively prevented the entry of the 1967 convictions, so the application was denied.

In November, 1982, the Petitioner filed a motion for leave to file a Petition for Writ of Error Coram Nobis in the Florida Supreme Court. The basis of the motion was the claim that his co-indictee in the capital case, Walter Rhodes, had made a statement under oath in which he had recanted his 1976 trial testimony and stated he shot the two victims. The Petitioner also submitted evidence relating to his 1967 convictions: a man named William Leiser testified the victims of the crimes had told him they knew the Petitioner wasn't involved, and a fellow convict named Robert Sheley testified he and not the Petitioner was responsible. The Petitioner argued the court should consider the evidence pertaining to the 1967 convictions because the trial court had relied on them as an aggravating factor in imposing the death sentence.

B. FACTS PERTINENT TO RELIEF SOUGHT

The Petitioner's coram nobis claim that Rhodes' recantation establishes Tafero did not shoot the victims is not a new one; the Petitioner's defense at trial and chief claim on direct appeal was that Rhodes and not he pulled the trigger. As previously noted, the contention

was rejected on direct appeal because the physical evidence and other testimony corroborated Rhodes' trial testimony. Tafero v. State, 403 So.2d 355, 359 (Fla. 1981).

Moreover, Rhodes' recantation claim that he moved to the side of the Camaro and shot the officers was inconsistent with the evidence adduced at trial. Both truck drivers who witnessed the shooting testified Rhodes was standing by the Camaro at the time of the shooting and had his hands up in the air. His empty hands remained in the air while all the shots were fired. This testimony corroborated Rhodes' trial testimony that he was in front of the cars with his hands in the air when co-defendant Sonia Jacobs fired the initial shots and the Petitioner took the gun from her and fired the rest. One of the truck driver witnesses testified Rhodes' hands were still empty when he entered the driver's side of the patrol car, and at trial Rhodes testified the Petitioner picked up the trooper's gun and casings from the pavement. The truck driver's testimony was consistent with Rhodes' trial testimony and it refuted Rhodes' recantation claim that he, Rhodes, had taken the trooper's gun after the shooting and he held both it and the fatal weapon up in the air as he entered the trooper's car.

The physical evidence at trial conclusively showed the shots were fired in the area in the middle of the Camaro on the driver's side and it likewise showed the two persons in that area were the Petitioner, who was in between the Camaro and the patrol car being held by Irwin near the trooper's windshield when the shots began, and Jacobs, who was in the back of the Camaro. Rhodes' recantation claim that he too was in the central area of the Camaro and did the shooting was patently false in light of the physical evidence and the testimony of the disinterested witnesses.

Aside from the trial evidence, there were other facts relevant to the assertions made in Rhodes' 1982 recantation statement. Rhodes' pretrial statements were all consistent with his trial testimony that the Petitioner grabbed the gun from Jacobs and fired at both officers. In January and March, 1982, Rhodes, while testifying in a different trial, reaffirmed his testimony that he did not shoot the officers. By contrast, Rhodes' 1982 statement was inconsistent with a similar statement he allegedly made to two fellow prisoners named Orf and Hysmith, whose testimony was the basis for a 1977 application for leave to file a Writ of Error Coram Nobis filed by the Petitioner, which was also denied. In the 1977 statement, Rhodes claimed he had shot the victims from the passenger side of the Camaro, through the car, which was at odds with the 1982 statement where Rhodes said he did the shooting from the driver's side. Additionally, in 1979 Rhodes claimed he did the shooting from the right front fender area of the patrol car. The three recantation statements were inconsistent with each other, and entirely different from the account of the shooting the Petitioner himself gave when he testified under oath as a defense witness at co-defendant Jacobs' trial. The Petitioner testified Rhodes had fired the shots from the front of the Camaro. He denied noticing the casings, picking them up, or seeing anyone take the trooper's gun. The Petitioner's account conflicts with Rhodes' 1982 statement where he says he, Rhodes, moved to the driver's side of the Camaro and fired the shots, the Petitioner picked up the casings, and the Petitioner passed a gun to him. Rhodes in 1982 claimed that he took the trooper's gun and held it up at face level--a sight the Petitioner would have seen if it were true.

Regarding the 1967 convictions, prior to the application in the Florida Supreme Court, the state trial

court entertained the Petitioner's Motion for New Trial. Although the Third District Court of Appeal held the trial court had no jurisdiction to hear the case, it treated the appeal as a Petition for Writ of Error Coram Nobis and in so doing, considered the witnesses' testimony and the trial court's findings. Tafero v. State, 406 So.2d 89, 93 f.n. 9 (3DCA Fla. 1981).

The trial court found the alleged newly discovered evidence was cumulative to the trial evidence since the Petitioner and several alibi witnesses testified. There were two eyewitnesses who positively identified the Petitioner by physical and photo lineups and in court. The court did not believe the witness Leiser's testimony about the alleged recantations since he gave no reasonable explanation as to why he failed to come forward sooner. The trial court also rejected the confession of Sheley as unbelievable and incredible in light of the trial testimony and the fact he didn't say he was guilty until eight years after the conviction and the Petitioner then waited four more years before taking action. The trial court also noted Sheley did not confess until after the statute of limitations had run.

REASONS FOR DENYING THE WRIT

THE FLORIDA CORAM NOBIS PROCEDURE DOES NOT VIOLATE A CAPITAL DEFENDANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS.

In Florida, it is the function of the appellate court which originally affirmed a conviction to review any subsequent application for a Writ of Error Coram Nobis and determine therefrom whether sufficient facts are alleged, which, if established by competent proof, would entitle the applicant to the writ. Cayson v. State, 139 So.2d 719 (1DCA Fla. 1962); Chambers v. State,

158 So. 153, 117 Fla. 642 (1924). The court reviews not only the application itself but the State's response and the record of the trial proceedings, Antone v. State, 410 So.2d 157 (Fla. 1982), to determine whether coram nobis will lie before granting permission to an applicant to apply for the writ at the trial level. If the appellate court finds the facts alleged are of such a vital nature that had they been known to the trial court, they conclusively would have prevented entry of the judgment, then it directs the trial court to determine the truth of the allegations in an evidentiary hearing. Hallman v. State, 371 So.2d 482, 485 (Fla. 1979).

The Petitioner asserts the coram nobis conclusiveness test denies him due process and is unfair to him because there is no rational reason for applying the conclusiveness test based solely on when the new evidence is discovered and as a capital defendant, the test should not have been applied to him. The Respondent maintains there is a rational reason for use of the conclusiveness test in any type of criminal case, including capital cases. As expressed in Hallman v. State, 371 So.2d 482, 485 (Fla. 1979), it is

> . . . predicated on the need for finality in judicial proceedings. This is a sound principle, for litigants and courts alike must be able to determine with certainty a time when a dispute has come to an end.

This Court has previously upheld Florida's coram nobis procedure as meeting due process requirements in the case of Hysler v. Florida, 315 U.S. 411 (1941). In Hysler, also a capital case, this Court held Florida has a valid interest in the just administration of its criminal law and the state Supreme Court had every right and the plain duty to scrutinize a recantation (made four years after the trial) with a critical eye as it was familiar with

the trial record. In the instant case, the state Supreme Court, in applying the conclusiveness test, reasonably concluded that the Rhodes' 1982 recantation and the matters regarding the 1967 convictions were false, for the reasons set forth in the Respondent's Statement of the Facts. That determination did not deprive the Petitioner of due process. As this Court recognized in Taylor v. Alabama, 335 U.S. 252 (1947), a capital defendant has no mandatory right to permission to apply for a Writ of Error Coram Nobis. In Taylor, the court held the affidavits supporting a petition must be read in close connection with the entire record for their reasonableness, the probability of their truth, the effectiveness of the attack they make on the original judgment, and their relationship to the general enforcement of the law with justice to all. Where the state Supreme Court has found a defendant's allegations unreasonable and no probability of truth contained therein, it is acting within its constitutional authority in denying coram nobis. Id.

The Florida Supreme Court in reviewing the allegations made in the instant case with regard to the 1976 murder convictions correctly concluded Rhodes' recantation statement was a lie and a sham. It was at odds w th the other evidence adduced at trial, it was inconsistent with prior recantation statements, and it was in disagreement with the Petitioner's own prior testimony. Concerning the 1967 felony convictions which were found as an aggravating factor in the murder cases, the matter had already been fully litigated in the trial and appellate courts and the trial court had rejected the alleged recantations and purported confession of another as unbelievable, so it would not have precluded entry of the judgments. Therefore, the Florida Supreme Court's denial of the Petitioner's application was not violative of the

Petitioner's constitutional rights. The decision was consistent with this Court's precedents of Hysler v. Florida and Taylor v. Alabama, supra, and thus, it neither conflicts with other decisions nor decided an important federal question previously unresolved by this Court. Rule 17(1)(b) and (c), Supreme Court Rules (1980). The Petition for Certiorari should be denied.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities cited therein, the Respondent respectfully requests that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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NO. 83-6150

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JESSE JOSEPH TAFERO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Writ of Certiorari was mailed to Marc Cooper, Esq., and Sharon L. Wolfe, Esq., Suite 500, Roberts Building, 28 West Flagler Street, Miami, FL 33130, this 8th day of February, 1984.

Of Counsel